

THE RESPONSE OF FEDERAL LEGISLATION TO HISTORIC PRESERVATION

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I

INITIAL LEGISLATION

Before 1966 federal legislation provided limited protection to some historic sites. Under the Antiquities Act of 1906,¹ protection was accorded to sites on lands owned or controlled by the United States. The President was authorized to "declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest . . . upon the lands . . . to be national monuments . . ."² He was also authorized to reserve as part of these monuments parcels of land necessary for the proper care and management of the objects to be protected, on the condition that the size of such reservations be confined to the smallest area compatible with these objectives.

This legislation further provided that the Secretaries of Agriculture, the Interior, and the Army could grant permits to certain scientific and educational institutions for historical and archaeological field work on lands under their respective jurisdictions. The permits might cover the examination of ruins, the excavation of archaeological sites, and the gathering of antiquities.³ Criminal penalties—a fine of up to \$500, or ninety days' imprisonment, or both—were specified for any person who, without such permission from the appropriate Secretary, "shall appropriate, excavate, injure or destroy any historic or prehistoric ruin or monument, or any object of antiquity . . . on lands owned or controlled by the United States."⁴

In 1935 Congress declared "a national policy to preserve for the public use historic sites, buildings and objects of national significance for the inspiration and benefit of the people of the United States."⁵ It authorized the Secretary of the Interior to carry out a number of functions relevant to the protection of such sites, granting him powers to make a survey of historic and archaeological sites, and to acquire, restore, maintain, and manage them.⁶ The 1935 provisions have been useful for both scholarship and preservation. However, except for the possibility of acquisition of sites by the Secretary of the Interior, they did little to protect privately-owned properties from destruction in cases where the owners or governmental authorities desired to put the subjacent lands to other uses. Even more seriously,

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¹ Act of June 8, 1906, ch. 3060, 34 Stat. 225, *as amended*, 16 U.S.C. §§ 431-33 (1970).

² 16 U.S.C. § 431 (1970).

³ *Id.* § 432.

⁴ *Id.* § 433.

⁵ Act of Aug. 21, 1935, 16 U.S.C. §§ 461-67 (1970).

⁶ 16 U.S.C. § 462 (1970).

they did nothing to restrain such destruction by the United States government itself. This problem was dealt with in two landmark federal statutes in 1966 and has received additional legislative attention in the past five years.

II

NATIONAL HISTORIC PRESERVATION ACT OF 1966

The National Historic Preservation Act of 1966⁷ established policy guidance and machinery for intensified efforts toward preservation in general and, in particular, protection from governmental depredation, at least at the federal level. The policy declarations of this Act, and of the other statutes to be discussed below, deserve attention for they may have more legal importance than is generally recognized. Congressional statements of policy may affect the conduct of officials in mission-oriented operating agencies by providing guidance supplementary to the terms of their own authorizing legislation. Such declarations may help a sympathetic official justify decisions, and even expenditures, based on considerations outside the primary mission of his agency. Policy statements, in addition, may influence courts to require agencies to consider issues which they might otherwise prefer to ignore.

One of the more significant preambulatory expressions in the 1966 Historic Preservation Act is the statement that "Congress finds and declares . . . that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people."⁸ While the implications of such a statement are by no means clear, I would suggest that this is more than mere window dressing. It includes the suggestion, for example, that adaptive uses of historic properties should be sought. The task of integrating these properties into the course of contemporary development thus presents a challenge of a much different proportion than that which follows from historic preservation for museum uses. Other important policy declarations are identified below.

In its substantive provisions, the Historic Preservation Act provides for the maintenance by the Secretary of the Interior of an expanded national register of districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, and culture,⁹ which has become known as the National Register of Historic Places. It authorizes the Secretary of the Interior to establish a program of matching grants-in-aid to states for the preservation of "properties that are significant in American history, architecture, archaeology and culture";¹⁰ and it authorizes him to provide matching grants-in-aid to the National Trust for Historic Preservation¹¹ (which had previously been chartered by Congress in 1949¹²). Perhaps

⁷ *Id.* § 470 *et seq.*

⁸ *Id.* § 470(a).

⁹ *Id.* § 470a(a)(1).

¹⁰ *Id.* § 470a(a)(2).

¹¹ *Id.* § 470a(a)(3).

¹² *Id.* § 468 *et seq.*

of greatest significance, the Act provided for the establishment of the Advisory Council on Historic Preservation.¹³ This body is now authorized to be composed of twenty members: ten appointed by the President from outside the federal government; the heads of eight federal agencies;¹⁴ the Secretary of the Smithsonian Institution; and the Chairman of the National Trust for Historic Preservation. The Advisory Council has a number of functions in connection with the encouragement of historic preservation, including the responsibility to advise the President and the Congress on such matters and to submit to them an annual comprehensive report; to recommend studies and encourage training and education; and to stimulate coordination with state and local agencies and with private institutions and persons.¹⁵

In addition, under section 106 of the Act,¹⁶ the Advisory Council has a highly significant role in the protection of National Register properties from so-called "undertakings" involving federal participation, direct or indirect. If a federal agency has direct or indirect jurisdiction over a proposed federal, federally-assisted, or federally-licensed undertaking which would affect any property listed on the National Register, the head of that federal agency has two responsibilities under section 106 before approving the expenditure of federal funds or issuing the license. The agency head must "take into account the effect of the undertaking" on the National Register property and "shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking."¹⁷

On its face section 106 does not purport to make it mandatory that the federal agency head follow the recommendations of the Advisory Council. As a practical matter, however, it may be awkward to ignore them, particularly in light of his statutory obligation that he "take into account the effect of the undertaking" on National Register sites. Furthermore, the Advisory Council's comments may provide a substantive basis for specific requirements under other statutory obligations applicable to the agency head. Examples of this effect can be found in the interaction between section 106 and certain provisions of the Department of Transportation Act which are discussed below.

The National Park Service of the Department of the Interior is responsible for providing administrative services to the Advisory Council as well as for the preparation of the National Register. It has formulated "criteria" for evaluating the quality of "significance" in connection with eligibility for the inclusion of properties on the National Register. The criteria refer, for instance, to the characteristics of "integrity of location, design, setting, materials, workmanship, feeling and associa-

¹³ *Id.* § 470i.

¹⁴ The federal agency heads designated to serve on the Advisory Council are the Secretaries of the Interior, Housing and Urban Development, Commerce, Treasury, Agriculture, and Transportation; the Administrator of the General Services Administration; and the Attorney General. 16 U.S.C. § 470(i). (Supp. 1971).

¹⁵ *Id.* § 470j.

¹⁶ *Id.* § 470f.

¹⁷ *Id.*

tion" in properties which are associated with significant historic events or persons;¹⁸ or that embody distinctive characteristics of a type, period, or method of construction; or that represent the work of a master; or that possess high artistic values; or that are valuable sources of historic or prehistoric information.

The Advisory Council in turn has relied on these National Register criteria in the formulation of its "effect criteria." Under the "effect criteria," the Advisory Council considers that an "undertaking" may have an "effect" on a National Register property, for purposes of section 106, "when any condition of the undertaking creates a change in the quality of the historical, architectural, archeological or cultural character that qualified the property under the National Register criteria for inclusion in the National Register."¹⁹ The "effect criteria" further define a concept of "adverse effect" as including destruction or alteration of the property; isolation from or alteration of its surrounding environment; and introduction of visual, auditory, or atmospheric elements that are out of character with the property and its setting.

III

DEPARTMENT OF TRANSPORTATION LEGISLATION

In 1966 Congress also enacted the Department of Transportation (DOT) Act.²⁰ In section 2(b)(2) Congress "declared . . . the national policy that special effort should be made to preserve . . . historic sites."²¹ This provision, which also calls for protection of parklands, has been described by a federal district judge as "one of the main purposes of the Department of Transportation Act"²²

The same act provides in section 4(f) that the Secretary of Transportation

shall not approve any program or project which requires the use of . . . any land from an historic site of national, State or local significance as . . . determined . . . [by the federal, state, or local officials having jurisdiction thereof] unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such . . . historic site resulting from such use.²³

This requirement, which also covers parklands, has recently been construed by the United States Supreme Court in the *Overton Park* case as prohibiting the destruction

¹⁸ O. GRAY, CASES AND MATERIALS ON ENVIRONMENTAL LAW 506 (1970).

¹⁹ *Id.* at 505.

²⁰ Pub. L. No. 89-670, 80 Stat. 931.

²¹ *Id.* § 1651(b)(2). Nothing in the section suggests, however, that the policy statement is limited to activities carried out under the Department of Transportation Act; the requirement for a "special effort . . . to preserve . . . historic sites" is apparently a national policy with respect to any activity to which national policies might be relevant.

²² Citizens Committee for the Hudson Valley v. Volpe, 302 F. Supp. 1083, 1090 (S.D.N.Y. 1969).

²³ 49 U.S.C. § 1653(f) (1970). The same provision appears in 23 U.S.C. § 138 (1970). A review of the legislative history is provided in Gray, *Environmental Requirements of Highway and Historic Preservation Legislation*, 20 CATHOLIC U.L. REV. 45 (1970). Since 1968 the language of section 2(b)(2) has also been repeated as the first sentence of section 4(f). For convenience of discussion herein this repetition is ignored, and references to section 4(f) apply specifically to the last sentence of section 4(f), which is described in the text.

of protected lands unless the Secretary of Transportation finds "that alternative routes present unique problems."²⁴ In the Court's view factors such as cost and community disruption are not to be given equal weight with the need for preservation in the evaluation of alternatives.²⁵ These factors are not to be ignored, but protection of parkland—which was at issue in the *Overton Park* case and has exactly the same statutory protection as historic sites under section 4(f)—is to be given "paramount importance." Section 4(f) meant, in the words of the Court, that protected lands "were not to be lost unless there were truly unusual factors present in a particular case or the cost of community disruption from alternative routes reached extraordinary magnitudes."²⁶

Sections 2(b)(2) and 4(f) apply to all activities of the Department of Transportation. Thus, coverage extends not only to federal-aid highways, but also to activities of the Federal Aviation Administration, the Coast Guard, the Urban Mass Transportation Administration, and the Federal Railroad Administration, among others.²⁷

Unlike section 106 of the National Historic Preservation Act of 1966, which provides for protection of properties on the National Register of Historic Places, section 2(b)(2) of the DOT Act applies to any "historic sites," and section 4(f) to any "historic site of national, State or local significance" as determined by either federal, state, or local officials having authority to make such determinations. Therefore, a National Register site is automatically entitled to protection under sections 2(b)(2) and 4(f) of the DOT Act as well as under section 106 of the National Historic Preservation Act. A non-National Register property, if determined to be of significance by other appropriate authority such as an official state or local landmark commission, also qualifies for protection under the DOT Act even if it is not entitled to protection under section 106.

The relationship between the two acts becomes particularly interesting in connection with the weight to be given a section 106 "comment" of the Advisory Council with respect to a federally-related undertaking affecting a National Register site. Under section 106 the head of the responsible agency must "take into account" the effect of the undertaking, and, presumably, the comments of the Advisory Council. Under the DOT Act, which in section 2(b)(2) requires a "special effort" toward preservation of the site, the comments of the Advisory Council may well have a bearing in defining the content of the "special effort." Section 4(f), moreover, requires "all possible planning to minimize harm" from a DOT project. The opinion of the Advisory Council that certain design improvements are necessary to minimize harm may, for example, eliminate the plausibility of arguments on the

²⁴ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413 (1971).

²⁵ *Id.* at 821.

²⁶ *Id.* at 822.

²⁷ The other activities in the Department of Transportation include the Saint Lawrence Seaway Development Corporation, the National Transportation Safety Board, and the National Highway Traffic Safety Administration.

part of the Federal Highway Administration that its own design is harmless or that the suggested design improvements are unnecessary, either in terms of irrelevance to historic values, or of such excessiveness of cost as to render the suggestion in effect not "possible." Thus, in the case of the Riverfront Expressway which had been proposed for construction through the Vieux Carré in New Orleans, the Federal Highway Administration had suggested that the road could be made compatible with its environs if it were decorated with wrought-iron grillwork in the style of some of the other recent desecrations of the area. It was the reasoned and eloquent insistence of the Advisory Council that, if it could not be relocated, the road must be completely depressed throughout its length regardless of the huge cost which had been estimated for such a design. This led to DOT's decision to abandon the project.²⁸

In order to avoid environmental damage by identifying problems as early as possible, Congress has also required that state highway departments proposing federal-aid highway projects in or around urban areas certify that public hearings have been held to consider the economic and social effects of a proposed location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community.²⁹ The implementing regulation, Policy and Procedure Memorandum 20-8,³⁰ goes beyond the statutory requirements by providing for two hearings, the first before location approval and the second before design approval. Section 4(c) of the Memorandum defines "[s]ocial, economic and environmental effects" to include both "[c]onservation" and "[n]atural and historic landmarks." In order to make it clear that the hearings are intended to be taken seriously by the highway authorities, Congress amended the statute late in 1970 to require that the state highway department's certification "be accompanied by a report which indicates the consideration given to the economic, social, environmental and other effects of the plan . . . and various alternatives which were raised during the hearing or which were otherwise considered."³¹

At the same time, Congress required the Secretary of Transportation to submit to Congress by July 1, 1972, guidelines concerning possible economic, social, and environmental effects of federal-aid highway projects, including "destruction or disruption of man-made and natural resources . . ."³² The new language provides that such effects should be "fully considered in developing such project . . ." and that the final decisions on the project should be "made in the best overall public interest, taking into consideration the need for fast, safe and efficient transportation, public services, and the costs of eliminating or minimizing such adverse effects . . ."³³

It remains to be seen whether highway authorities will attempt to interpret this

²⁸ See DOT Press Release of July 9, 1969, in O. GRAY, *supra* note 18, at 511.

²⁹ 23 U.S.C. § 128 (1970).

³⁰ 23 C.F.R. App. A (1971).

³¹ Federal-Aid Highway Act of 1970, Pub. L. No. 91-605, § 135(a), 84 Stat. 1713.

³² *Id.* § 136(b), amending 23 U.S.C. § 109 (1970).

³³ *Id.*

language so as to undercut section 4(f) of the DOT Act. They may argue that environmental protection should now be considered, within the framework of "the best overall public interest," as one element on parity with other factors, such as transportation needs and costs, rather than as a matter of "paramount importance" as section 4(f) requires according to the Supreme Court's *Overton Park* decision. It is not unlikely that such an effort will be made. Such an interpretation will undoubtedly be resisted on the ground that the new Act's requirement for procedures to assure that all relevant public policy elements are considered is not inconsistent with the existing statutory requirements in section 4(f) of the DOT Act, concerning the relative weight to be given to some of such elements.

With the possible exception of this new provision for environmental guidelines in the highway program, all recent transportation legislation has re-emphasized the need for environmental protection. Moreover, the inclusion of historic preservation within the scope of the environmental protection concept appears to be well established. In the Urban Mass Transportation Assistance Act of 1970, for example, Congress declared its policy that planning for federally-assisted urban mass transportation projects should take into consideration the effect of these projects upon buildings and sites of historical significance. The Act required the Secretary of Transportation to consult, in implementing this policy, with "the Secretaries of . . . Housing and Urban Development, and Interior, and with the Council on Environmental Quality with regard to each project that may have a substantial impact on the environment."³⁴ This Act prohibits the approval of federal urban mass transportation assistance unless the Secretary of Transportation

finds in writing, after a full and complete review of the application and of any hearings held . . . that (1) adequate opportunity was afforded for the presentation of views by all parties with a significant . . . environmental interest, and fair consideration has been given to the preservation and enhancement of the environment and to the interests of the community in which the project is located, and (2) either no adverse environmental effect is likely to result from such project, or there exists no feasible and prudent alternative to such effect and all reasonable steps have been taken to minimize such effect.³⁵

This language echoes section 4(f) of the DOT Act. Here again there is a possibility of an attempt to dilute the force of section 4(f), and arguments can be developed against such an attempt. It is clear, for instance, that sections 2(b)(2) and 4(f) continue to apply to activities of the Urban Mass Transportation Administration, in addition to the requirements for historic protection contained in section 14 of the Urban Mass Transportation Assistance Act. The relationship between these sections is illustrated in table I.

³⁴ Urban Mass Transportation Assistance Act of 1970, Pub. L. No. 91-453, § 6, 84 Stat. 962, amending Urban Mass Transportation Act of 1964, § 14, 49 U.S.C. 1610 (Supp. V, 1970).

³⁵ *Id.*

TABLE I

HISTORIC SITE PROTECTION UNDER URBAN MASS TRANSPORTATION PROGRAM

Department of Transportation Act of 1966, as amended		Urban Mass Transportation Act of 1970
§ 2(b)(2)	§ 4(f)	§ 14
*Applies to all historic sites.	*Applies to all sites determined to be of "national, State or local significance" by the "Federal, State or local officials having jurisdiction thereof."	*Applies to "important historical or cultural assets."
*Requires a "special effort" to preserve the sites.	*Approval prohibited unless there is no feasible and prudent alternative, in which event *Requires "all possible planning to minimize harm."	*Requires "all reasonable steps... to minimize such effect."

Section 14 might appear to weaken section 4(f), from "all possible planning" to "all reasonable steps." Since, however, there is no evidence that section 14 was intended to repeal section 4(f), it could be concluded that section 14 should be interpreted so as to be consistent with both sections 2(b)(2) and 4(f), rather than inconsistent with either of them. Such a reading would result in the strengthening of the provisions of the DOT Act, by applying the section 14 requirements to urban transportation projects affecting historic sites which are "important," within the meaning of section 14, even though they may not be entitled to the section 4(f) protection accorded sites of "national, State, or local significance" as determined by the "Federal, State, or local officials having jurisdiction thereof." Such a site might be one considered of local historic importance by the experts in the Office of History and Archaeology of the National Park Service, or perhaps by the National Trust for Historic Preservation, or by the Department of Housing and Urban Development, but not yet included on the National Register, nor designated by an official local landmark commission. This additional protection would be important, for example, if an urban mass transportation project threatened a site which, although eligible for inclusion on the National Register, had not yet been designated as a National Register property. It is also important in connection with historically significant properties in localities where there is no landmark commission or where the commission is not effective. In such cases, section 4(f) does not apply³⁸ and the section 2(b)(2) requirement is expressed only as a "special effort." Nonetheless, section 14 adds the requirement, similar to that of section 4(f), that the project is prohibited in the absence of feasible and prudent alternatives, and even in such absence, unless at least

³⁸ See note 23 *supra* and accompanying text.

reasonable steps are taken to minimize the harm. If, on the other hand, the property qualifies for section 4(f) protection as well, the necessary effort to minimize harm would have to include both "all reasonable steps" under section 14, and "all possible planning" under section 4(f).

Similar provisions for environmental protection are contained in the Airport and Airway Development Act of 1970.³⁷ Congress declared a policy that "airport development projects . . . shall provide for the protection and enhancement of . . . the quality of environment of the Nation" and required the Secretary of Transportation to consult with the Secretary of the Interior "with regard to the effect that any [airport] project . . . may have on natural resources . . . and other factors affecting the environment . . .".³⁸ The Secretary is prohibited from authorizing any project "found to have adverse effect unless . . . [he] shall render a finding, in writing, following a full and complete review, which shall be a matter of public record, that no feasible and prudent alternative exists and that all possible steps have been taken to minimize such adverse effect."³⁹ Moreover, public hearings are required for purposes of considering "the economic, social, and environmental effects of the airport location and its consistency with the goals and objectives of such urban planning as has been carried out by the community."⁴⁰

Curiously, the Airport and Airway Development Act does not explicitly define "environment" to include historic preservation. In view, however, of the applicability of sections 2(b)(2) and 4(f) of the DOT Act to activities within DOT, including those of the Federal Aviation Administration, and in view of the definitions in the National Environmental Policy Act of 1969, to be discussed below, there seems little doubt that "environment" will be construed to include historic preservation for purposes of this act as well as for purposes of other environmental protection legislation applicable to DOT.

IV

CONTRASTS WITH THE HOUSING PROGRAM

Transportation legislation has been emphasized in the foregoing discussion because it is in this field that Congress first provided systematic statutory inhibitions and prohibitions against the destruction of historic sites by federally-financed construction programs. Until 1970 transportation programs were the only federal public works activities which were so controlled. It was entirely appropriate to apply such safeguards to the activities of DOT, since the federal-aid highway program has generated some of the more noteworthy problems for the cause of historic preservation—as evidenced in New Orleans;⁴¹ in Washington with its Georgetown

³⁷ Pub. L. No. 91-258, 84 Stat. 219.

³⁸ *Id.* § 16(c)(4).

³⁹ *Id.*

⁴⁰ *Id.* § 16(d)(1).

⁴¹ See note 28 *supra* and accompanying text.

Historic District;⁴² potentially in New York City, where the Lower Manhattan Expressway would have gone through the cast iron building district;⁴³ and more recently in Charleston in connection with the threatened consequences of the proposed James Island bridge.⁴⁴

Even more noteworthy, however, is the damage wrought by activities under the jurisdiction of the Department of Housing and Urban Development (HUD). Historic buildings tend to be relatively old. Slum clearance and urban renewal projects tend to be carried out in old neighborhoods. These projects therefore lead to the destruction of historic sites. This may sometimes occur inadvertently. Sometimes, however, housing authorities deliberately plan to use federal funds to destroy properties which conspicuously display landmark commission plaques, as in a highly distasteful recent episode in Brownsville, Texas, involving the Convent of the Sacred Heart. Federal funds have been made available for this purpose, despite protests both from unofficial conservationists and from the Advisory Council on Historic Preservation itself.

The HUD legislation does not contain prohibitions like sections 2(b)(2) and 4(f) of the DOT Act. Perhaps compliance with the National Environmental Policy Act of 1969 would provide effective constraints. In fairness to the HUD program, however, it should be noted that the preservation of run-down property often requires more than a prohibition against destructive federal programs. Preservation planning can be costly, and private owners frequently wish to sell or replace old properties. Nothing in federal law prevents such actions. As a practical matter, what is required is funds with which to buy such properties for preservation purposes, to plan for their restoration, and to restore and maintain them.

Here the HUD programs can be of some help. While financing the destroyers, HUD can also help finance preservation efforts. Since 1966⁴⁵ HUD has been authorized to provide grants to municipalities and counties for two-thirds of the cost of surveys of historic structures and sites. The surveys may be carried out in localities determined by appropriate local authorities to be of historic or architectural value. The purposes of the surveys are to identify historic properties and provide other information necessary for an effective program of historic preservation in such locality. These grants are not available for detailed restoration plans for specific properties.

⁴² A proposed bridge approach to the Georgetown district, the Three Sisters Bridge across the Potomac River, has already been involved in spirited litigation. *D.C. Fed'n of Civic Ass'ns v. Volpe*, 434 F.2d 436 (D.C. Cir. 1970). The interstate highway project to which the bridge would connect, a spur of I-66, which would pass through the Georgetown Historic District for the benefit of truck traffic banned from the principal I-66 crossing at Theodore Roosevelt Bridge, has not yet been litigated.

⁴³ The proposed Lower Manhattan Expressway project has been abandoned by Mayor Lindsay.

⁴⁴ The James Island Bridge would not itself have impinged physically into an historic district, but as proposed it threatened to disgorge excessive quantities of traffic into the district. The project is being restudied to determine whether the bridge traffic can be re-routed away from the historic area.

⁴⁵ Demonstration Cities and Metropolitan Development Act of 1966, 40 U.S.C. 461(h) (1970), amending Housing Act of 1954, 40 U.S.C. § 461 (1964).

This same Act, however, also provides for amendments to two other laws for the purpose of authorizing program assistance for historic preservation. Title VI of the 1966 Act amends the urban renewal law to include historic and archaeological preservation within the definitions of urban renewal plans⁴⁶ and urban renewal project activities.⁴⁷ Activities which may now be financed under urban renewal projects include the acquisition and restoration of historic properties, the relocation of such properties within or outside urban renewal project areas, and the disposition of preserved properties for use in accordance with renewal plan.⁴⁸ The 1966 Act further amended section 110(d)(2) of the urban renewal law⁴⁹ by authorizing local grant-in-aid credit for expenditures by localities and other public bodies for historic and archaeological preservation.

In addition, the 1966 Act amended the Housing Act of 1961, which had provided for open space and urban beautification programs, in order to provide for grants for historic preservation as well.⁵⁰ These grants, up to fifty per cent of project costs, need not be in urban renewal areas. They are available to states and local public bodies to assist in the acquisition of title to or permanent interests in properties of historic or archaeological value in urban areas. Restoration and improvement of such properties for public use and benefit may be financed by these grants.

In section 605(h)⁵¹ of the 1966 Act, historic preservation grants under the HUD programs discussed above are prohibited unless the Secretary of HUD finds that the areas or objects to be preserved meet criteria comparable to those used in establishing the National Register maintained by the Secretary of the Interior. Congress emphasized that it did not intend inclusion on the National Register itself to be a prerequisite for this assistance. The historic and archaeological sites to be preserved with grants under these programs, according to the House Committee Report, are to be determined by the localities themselves, subject to general federal guidelines.⁵² The committee quoted approvingly from another report to the effect that those who "treasure a building for its pleasing appearance or local sentiment do not find it less important because it lacks proper historic credentials."⁵³

This legislative history may have contributed to confusion among HUD administrators as to the relative importance, in connection with the protection of historic sites, of local agency decisions as compared with federal landmark designations. The committee report clearly approves the use of HUD funds to preserve properties which are not on the National Register. It does not, however, justify the use of other HUD funds to destroy properties which are on the National Register. Unfortunately,

⁴⁶ 42 U.S.C. 1460(b) (1970), *amending* Housing Act of 1949, 42 U.S.C. § 1460(b) (1964).

⁴⁷ 42 U.S.C. § 1460(c)(9)-(10) (1970), *amending* Housing Act of 1949, 42 U.S.C. § 1460(c) (1964).

⁴⁸ 42 U.S.C. § 1460(c)(4) (1970).

⁴⁹ 42 U.S.C. § 1460(d)(2) (1970), *amending* Housing Act of 1949, 42 U.S.C. § 1460(d)(2) (1964).

⁵⁰ *Id.* § 1500d-1, *amending* 42 U.S.C. §§ 1500 *et seq.* (1964).

⁵¹ 42 U.S.C. § 1500d-1 (1970).

⁵² H.R. REP. NO. 1931, 89th Cong., 2d Sess. 34 (1966).

⁵³ *Id.* at 35.

despite the weight seemingly due Advisory Council comments under section 106 of the National Historic Preservation Act, HUD, in the view of many, often functions with apparent indifference to the destruction of historic sites, even National Register properties, whenever local development authorities are prepared to sacrifice those properties in the interests of urban renewal or other housing programs.⁵⁴

Finally, the 1966 HUD Act has one provision of special interest to the National Trust for Historic Preservation: section 603(a) authorized the Secretary of HUD to grant to the National Trust up to \$90,000 per structure for costs incurred by the Trust in renovating or restoring structures accepted by the Trust, which it will maintain for historic purposes.⁵⁵ Unlike many federal grant programs, this authorization does not require matching funds from the recipient.

V

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

On January 1, 1970, the President signed into law the epochal National Environmental Policy Act of 1969 (NEPA).⁵⁶ This Act clearly establishes historical preservation as a national environmental objective and provides a methodology applicable to all federally-assisted public works projects which, if faithfully implemented, should inhibit unnecessary destruction of historic places. The policy declaration specifies a "continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy . . . [to] fulfill the responsibilities of each generation as trustee of the environment for succeeding generations"; to "assure for all Americans . . . esthetically and culturally pleasing surroundings"; and to "preserve important historic, cultural, and natural aspects of our national heritage . . .".⁵⁷

In section 102 of NEPA Congress "authorizes and directs that, to the fullest extent possible . . . the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act,"⁵⁸ and that all agencies of the government follow certain procedures to be described below. All agencies of the federal government must report to the President by July 1, 1971, any feature of their statutory or regulatory structure which prevents compliance and must propose the modifications necessary to effectuate the policies of the Act.⁵⁹

The procedures required by section 102 can have far-reaching consequences for government agencies which previously considered themselves dedicated solely to, and

⁵⁴ I base this observation on my own experience in the period 1968-70, when I sat on the Advisory Council as the representative of Secretaries of Transportation Alan S. Boyd and John A. Volpe, and on conversations with present participants in the activities of the Advisory Council.

⁵⁵ 16 U.S.C. § 470b-1 (1970).

⁵⁶ 42 U.S.C. § 4321-47 (1970).

⁵⁷ *Id.* § 4331(b).

⁵⁸ *Id.* § 4332.

⁵⁹ *Id.* § 4333.

limited by, the narrow objectives of the statutes which were specifically designed to govern their respective agency functions. Section 102 requires that all agencies, "to the fullest extent possible . . . use a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment" The section further requires a detailed statement by the responsible official of the environmental impact of proposed federal actions, including a discussion of the adverse effects of a proposed action and the alternatives to it. The environmental statements are required "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment"⁶⁰

These requirements are procedural. Unlike sections 2(b)(2) and 4(f) of the DOT Act, they prescribe a methodology rather than priorities. They do not forbid environmental damage; they merely require the decision-maker to discover and articulate in advance the consequences of his proposed actions. The practical effect of such a procedure should not be underestimated. While it permits environmental damage, the requirement for a detailed advance statement provides strong incentives toward an honest search for alternatives for any public official who would prefer not to brand himself as a vandal. A further advantage in procedural requirements lies in the readiness of courts to enforce such requirements, whatever reluctance they may profess in the substitution of their own judgment on substantive issues for that of an administrator. The Alaska pipeline injunction is a vivid example of the ability of conservation organizations to get a court to stop a federal program because of defects in compliance with the procedural requirements of NEPA.⁶¹

There are questions, of course, as to when a proposed federal action should be considered a "major federal action significantly affecting the quality of the human environment"⁶² for purposes of triggering the NEPA requirements for detailed environmental statements. Guidance has been made available by the Council on Environmental Quality, which was established under NEPA to help carry out the purposes of the Act.⁶³ The Council has been delegated authority by the President to issue guidelines to federal agencies for the preparation of the environmental statements⁶⁴ and to issue "such other instructions to agencies . . . as may be required to carry out the Council's responsibilities" under NEPA,⁶⁵ including the review and

⁶⁰ *Id.* § 4332.

⁶¹ *Wildness Society v. Hickel*, 1 E.R.C. 1335 (D.D.C. 1970). See also *Environmental Defense Fund v. Corps of Engineers*, 2 ERC 1260 (E.D. Ark. 1971), which enjoined the Corps' Gilham Dam project; the court called the section 102 requirements "procedural" rather than "substantive," and then proceeded to enjoin the project on the ground that the corps' environmental statement was incomplete in the court's opinion and because "defendants did not utilize a systematic, interdisciplinary approach in evaluating the environmental impact of the dam. . . ."

⁶² See note 60 *supra* and accompanying text.

⁶³ 42 U.S.C. § 4342 (1970).

⁶⁴ Exec. Order No. 11,514, § 3(h), 3 C.F.R. 106 (1970 Comp.).

⁶⁵ *Id.* § 3(i) at 106.

appraisal of all federal programs in light of NEPA policy.⁶⁶ The Council's guidelines make it clear as a minimum that proposed actions "the environmental impact of which is likely to be highly controversial" should be covered by a NEPA environmental impact statement "in all cases."⁶⁷

VI

DISPOSAL OF FEDERAL PROPERTY FOR HISTORIC PRESERVATION PURPOSES

Surplus federal realty, including improvements and equipment thereon, may be transferred for use as a "historic monument for the benefit of the public."⁶⁸ Such transfers are to be made with the approval of the Administrator of the General Services Administration and without monetary consideration. Eligible recipients include states, municipalities, and their subdivisions. The property must be determined by the Secretary of the Interior to be suitable for such use, in conformity with recommendations of the Advisory Board on National Parks, Historic Sites, Buildings and Monuments, which was established pursuant to the 1935 preservation legislation.⁶⁹ The historical value of the site must relate to events more than fifty years in the past, and the recipient must promise to use and maintain the property for the purpose for which transferred for at least twenty years.

In addition, the Secretary of the Interior has separate authority,⁷⁰ under the 1954 amendments to the Recreation Act of June 14, 1926,⁷¹ to convey or lease land for historic monument purposes both to states or their public subdivisions and to private non-profit organizations. Conveyances to public agencies for use as historic monuments may be without consideration; conveyances to non-profit corporations or associations for "public" use must be at prices to be fixed by the Secretary of the Interior through appraisal, taking into consideration the purposes for which the lands are to be used. In both cases questions may arise as to the propriety of transfers for living uses, to carry out the policy expressed in the National Historic Preservation Act of 1966 that historic sites "should be preserved as a living part of our community life and development . . ."⁷² Doubts have been expressed about whether a building with rent-paying private tenants qualifies as a historic "monument," and as to whether such use qualifies as a "public use."

On February 8, 1971, the President announced, in his first annual report to Congress on the State of the Nation's Environment, that he is "recommending legislation to permit State and local governments more easily to maintain transferred

⁶⁶ 42 U.S.C. § 4342 (1970).

⁶⁷ Statements on Proposed Federal Actions Affecting the Environment, § 5(b), 36 Fed. Reg. 1398 (1971).

⁶⁸ Act of June 10, 1948, 50 U.S.C. App. § 1622(h) (1964), *amending* Surplus Property Act of 1944, 50 U.S.C. App. §§ 1611-46 (1964).

⁶⁹ 16 U.S.C. § 463 (1970).

⁷⁰ 43 U.S.C. § 869-1 (1970).

⁷¹ Act of June 4, 1954, 43 U.S.C. §§ 869-1 to -4 (1970), *amending* Act of June 14, 1926, 43 U.S.C. § 869 (1964).

⁷² See note 8 *supra* and accompanying text.

Federal historic sites by allowing their use for revenue purposes"⁷³ In the same message, the President noted that "present Federal income tax policies provide much stronger incentives for demolition of older buildings than for their rehabilitation."⁷⁴ The President announced that he would propose tax measures "to overcome these present distortions and particularly to encourage the restoration of historic buildings . . . [and] to permit Federal insurance of home improvement loans for historic residential properties to a maximum of \$15,000 per dwelling unit."⁷⁵ He further announced that procedures would be established to insure that property owned by the federal government would not be destroyed until a review of its historical significance had been undertaken.⁷⁶

CONCLUSION

This paper has discussed federal legislation for historic preservation. We have seen a number of different congressional expressions of policy which attempt to explain why historic sites should be preserved. It is clear that among the purposes of preservation are included the purposes of historic study itself. Those purposes have perhaps found their most elegant legislative expression in that most lyrical of statutes, the National Foundation on the Arts and the Humanities Act of 1965.⁷⁷ That Act defines "humanities" to include the study of history and archaeology and its preamble includes a statement of the reasons for the study of the humanities. These reasons may serve as the guiding principle for historic preservation efforts as well:

The Congress hereby finds and declares . . . that a high civilization must not limit its efforts to science and technology alone, but must give full value and support to the other great branches of man's scholarly and cultural activity in order to achieve a better understanding of the past, a better analysis of the present, and a better view of the future. . . .⁷⁸

For a country which is puzzled about its present, and troubled by uncertainties as to its future, it is increasingly important that lawyers make effective use of the legal tools which Congress has provided in order that the record of our national past may be preserved in the interest of both our present life and our national future.

⁷³ MESSAGE FROM THE PRESIDENT OF THE UNITED STATES ON THE STATE OF THE NATION'S ENVIRONMENT, H.R. Doc. No. 92-46, 92d Cong., 1st Sess. 16 (1971).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 17.

⁷⁷ 20 U.S.C. §§ 951-63 (1970).

⁷⁸ *Id.* § 951.